



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R2-ES-2013-0014]

[4500030113]

RIN 1018-AZ32

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the New Mexico Meadow Jumping Mouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the June 20, 2013, proposed designation of critical habitat for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability

of a draft economic analysis and draft environmental assessment of the proposed designation, as well as an amended required determinations of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed critical habitat rule, the associated draft economic analysis and draft environmental assessment, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: The comment due date for the proposed rule published in the **Federal Register** on June 20, 2013 (78 FR 37328) is extended. We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may obtain copies of the proposed rule and the associated documents of the draft economic analysis and draft environmental assessment on the internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2013–0014 or by mail from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Written comments: You may submit written comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the critical habitat proposal and associated draft economic analysis and draft environmental assessment by searching for FWS–R2–ES–2013–0014, which is the docket for the critical habitat rulemaking.

(2) *By hard copy*: Submit comments on the critical habitat proposal and

associated draft economic analysis and draft environmental assessment by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2013–0014; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Wally “J” Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; by telephone 505–346–2525; or by facsimile 505–346–2542. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for the New Mexico meadow jumping mouse that was published in the **Federal Register** on June 20, 2013 (78 FR 37328), our draft economic analysis, the draft environmental assessment, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

- (a) The distribution of the New Mexico meadow jumping mouse;
- (b) The amount and distribution of New Mexico meadow jumping mouse habitat;
- (c) What areas occupied by the species at the time of listing that contain features essential for the conservation of the species we should include in the critical habitat designation and why; and
- (d) What areas not occupied at the time of listing are essential to the conservation

of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their probable impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the New Mexico meadow jumping mouse and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, the benefits of including or excluding areas that exhibit these impacts.

(6) Information on the extent to which the description of economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and the description of the environmental impacts in the draft environmental assessment is complete and accurate.

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the draft economic analysis, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(8) Whether any areas we are proposing for critical habitat designation should be

considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

If you submitted comments or information on the proposed rule during the initial comment period from June 20, 2013, to August 19, 2013, please do not resubmit them. We have incorporated them into the public record and will fully consider them in the preparation of our final determination. Our final determination will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed as critical habitat are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule, draft economic analysis, or draft environmental assessment by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, draft economic analysis, and draft environmental assessment, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R2–ES–2013–0014 or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

On June 20, 2013, we published in the **Federal Register** a proposed rule to list the New Mexico meadow jumping mouse as endangered (78 FR 37363) and designate critical habitat (78 FR 37328). For more information on the species and the species' habitat, refer to the May 2013 Draft Species Status Assessment Report for the New Mexico Meadow Jumping Mouse (SSA Report; Service 2013), available online at <http://www.regulations.gov> in Docket No. FWS–R2–ES–2013–0023 in association with the proposed listing rule. We proposed to designate approximately 310.5 kilometers (km)

(193.1 miles (mi)) (5,892 hectares (ha) (14,560 acres (ac))) in eight units as critical habitat within Bernalillo, Colfax, Mora, Otero, Rio Arriba, Sandoval, and Socorro Counties, in New Mexico; Las Animas, Archuleta, and La Plata Counties, Colorado; and Greenlee and Apache Counties, Arizona. Those proposals had 60-day comment periods, ending August 19, 2013. We will publish in the **Federal Register** a final listing for the New Mexico meadow jumping mouse on or before June 20, 2014.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat

based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided that such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the New Mexico meadow jumping mouse, the benefits of critical habitat include public awareness of the presence of the New Mexico meadow jumping mouse and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the New Mexico meadow jumping mouse due to protection from adverse modification or destruction of critical habitat. In practice,

situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We are considering exclusion of the proposed critical habitat areas on Isleta Pueblo and Ohkay Owingeh to the extent consistent with the requirements of section 4(b)(2) of the Act. Areas owned by Isleta Pueblo that we are considering for exclusion from the final critical habitat designation include 43 ha (105 ac) along 3.7 km (2.3 mi) of ditches, canals, and marshes in Subunit 6-A. Areas owned by Ohkay Owingeh that we are considering for exclusion from the final critical habitat designation include 51 ha (125 ac) along 4.8 km (3.0 mi) of ditches, canals, and marshes in Subunit 6-B.

For the reasons described below, the Service is considering these lands for exclusion under section 4(b)(2) of the Act. We sent notification letters in November 2011 to both Tribes describing our listing and critical habitat designation process, and we have engaged in conversations with both Tribes about the proposed rules to the extent possible without disclosing predecisional information. At their invitation, on August 14, 2013, we attended a coordination meeting with the Isleta Pueblo to discuss the proposed rules, and they provided additional information regarding their land management practices and the potential for developing an endangered species management plan. The Isleta Pueblo has conducted a variety of voluntary measures, restoration projects, and management actions to conserve riparian vegetation, including not allowing cattle to graze within the bosque (riparian areas) and protecting riparian habitat from fire, maintaining native vegetation, and preventing habitat fragmentation (Service 2005; 70

FR 60955; Pueblo of Isleta 2005, entire). Since the meeting, Isleta Pueblo indicated that they intend to amend their riverine management plan for the Rio Grande silvery minnow (*Hybognathus amarus*) and southwestern willow flycatcher (*Empidonax traillii extimus*), which will address and contribute to the conservation of the New Mexico meadow jumping mouse (Pueblo of Isleta 2013, entire).

Ohkay Owingeh has conducted a variety of voluntary measures, restoration projects, and management actions to conserve the New Mexico meadow jumping mouse and its habitat on their lands. The Pueblo has engaged in riparian vegetation and wetland improvement projects, while managing to reduce the occurrence of wildfire due to the abundance of exotic flammable riparian vegetation, including using Tribal Wildlife Grants in both 2004 and 2006 to restore riparian and wetland habitat to benefit the southwestern willow flycatcher, bald eagle (*Haliaeetus leucocephalus*), and other riparian species on 36.4 ha (90 ac) of the Rio Grande (Service 2007a, p. 42; Service 2005, 70 FR 60963). Funding for another 10.9 ha (27 ac) of riparian and wetland restoration was provided in 2007 (Service 2012f, p. 12). The Pueblo received an additional Tribal Wildlife Grant in 2011 to conduct surveys and restore habitat for the New Mexico meadow jumping mouse (Service 2012f, p. 12). The long-term goal of the Pueblo's riparian management is to implement innovative restoration techniques, decrease fire hazards by restoring native vegetation, share information with other restoration practitioners, utilize restoration projects in the education of the Tribal community and surrounding community, and provide a working and training environment for the people of the Pueblo. Ohkay Owingeh indicated that they intend to use their Riparian and

Bosque Habitat Restoration and Management Plan to maintain dense wetland vegetation and moist soil conditions to provide suitable habitat for the conservation of the New Mexico meadow jumping mouse (Ohkay Owingeh 2013, entire).

In addition to these management plans under development by the tribes, the Service also is considering exclusion of these tribal lands on the basis of the working relationship we have established. We are aware that designation of critical habitat on tribal lands is generally viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we have received public comments indicating that tribes prefer to work with us on a Government-to-Government basis. Therefore, we are considering exclusion of these tribal lands in critical habitat Subunits 6–A and 6–B to maintain our working relationships with the tribes.

A final determination on whether the Secretary will exercise her discretion to exclude any of these areas from critical habitat for the New Mexico meadow jumping mouse will be made when we publish the final rule designating critical habitat. We will take into account public comments and carefully weigh the benefits of exclusion versus inclusion of these areas. The potential benefits of designating critical habitat include: (1) Triggering consultation under section 7 of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county

governments or private entities; and (4) preventing people from causing inadvertent harm to the species. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects funded or undertaken by Federal agencies.

However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is now available for review and comment (see **ADDRESSES** section).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a proposed designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species.

The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the New Mexico meadow jumping mouse. We began by conducting a

screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species, which may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM are what we consider our draft economic analysis of the proposed critical habitat designation for the New Mexico meadow jumping mouse, and this information is summarized in the narrative below.

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the regulatory analysis requirements of the executive orders, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to

the extent practicable, the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the New Mexico meadow jumping mouse, first we identified, in the IEM dated July 8, 2013, probable incremental economic impacts associated with the following categories of activities: riparian habitat restoration, fire management plans, fire suppression, fuel reduction treatments, forest plans, livestock grazing allotment management plans, travel management plans recreational use (with U.S. Forest Service), water management and delivery (with Bureau of Reclamation, Army Corps of Engineers, and Fish and Wildlife Service), bridge and road realignment projects (Federal Highways Administration), National Wildlife Refuge planning and projects, beaver management (Department of Agriculture's Animal and Plant Health Inspection Service), and restoration or recovery activities that may affect this species.

We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the New Mexico meadow jumping mouse is present, Federal agencies would already be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the

species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (i.e., the difference between the jeopardy and adverse modification standards) for the New Mexico meadow jumping mouse's critical habitat. The designation of critical habitat for New Mexico meadow jumping mouse was proposed concurrently with the listing. In our experience with such simultaneous rulemaking actions, discerning which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat is difficult. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the New Mexico meadow jumping mouse would also likely adversely affect the essential physical and biological features of critical habitat. The IEM outlines our rationale concerning baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the New Mexico meadow jumping mouse is approximately 310.5 river km (193.1 river mi) (5,892 ha (14,560 ac)) in eight units as critical habitat. Some of these eight units are divided into subunits. There are a total of 23 units plus subunits encompassed by the 8 main units. We consider the 29 locations where the jumping mouse has been found since 2005 to be within the geographic area occupied at the time of listing (occupied areas). All of these 29 occupied locations are contained within 19 of the 23 proposed critical habitats units. Approximately 1 percent (59.7 ha (147.5 ac)) of the proposed critical habitat is currently occupied by the species. Four of the proposed units are completely unoccupied: 3–C Rio de las Vacas, 4–B Upper Rio Peñasco, 6–A Isleta Pueblo, and 6–B Ohkay Owingeh. The remaining 5,832.1 ha (14,411.5 ac), approximately 99 percent of the total proposed critical habitat designation, are currently unoccupied by the species, but are essential for the conservation of the species.

Because the main factor making the New Mexico jumping mouse vulnerable to extinction is the loss of suitable habitat, proposed critical habitat units must be protected and allowed to regrow the needed vegetation for suitable New Mexico jumping mouse habitat, particularly those that contain unoccupied areas. Because the jumping mouse populations are currently small and isolated from one another, the survival and recovery of the species will require expanding the size of currently occupied areas containing suitable habitat into currently unoccupied areas that need to reestablish suitable conditions. Regeneration of suitable habitat in these areas will involve modifying or limiting actions that preclude the development of PCEs (i.e., modifying proposed actions

in order to allow appropriate vegetation to regrow) that make up suitable habitat.

During section 7 consultation for unoccupied areas, we would expect some conservation measures to be implemented to avoid destruction or adverse modification. As a result, we anticipate the most probable incremental economic impacts would be associated with developing and implementing conservation measures within unoccupied areas because no section 7 consultation would have likely occurred without the critical habitat designation. Incremental costs would be both administrative costs and the actual costs for implementing measures needed to avoid adverse modification in unoccupied areas. Therefore, we anticipate incremental effects with regard to ongoing and proposed Federal actions, including developing and implementing conservation measures that may differ between currently occupied and unoccupied critical habitat and habitat for the jumping mouse.

In the case of the jumping mouse, we anticipate that additional project modifications as a result of designating critical habitat are predictable because: (1) The majority of each proposed critical habitat unit is considered unoccupied by the species; and (2) the New Mexico jumping mouse is intimately tied to its habitat such that any potential project modifications to avoid adverse modification of unoccupied critical habitat would likely differ substantially from those that are likely to be required to avoid jeopardizing this species. This difference in anticipated project modifications results from the difference in the riparian vegetation within occupied and unoccupied areas within units. The unoccupied areas of proposed critical habitat do not presently contain

suitable habitat. All of these completely or partially unoccupied areas currently contain flowing water that is required for future regeneration of the physical and biological features of habitat required to sustain the species' life-history processes. These unoccupied areas will require reestablishment of the primary constituent elements (PCEs), and are essential to the conservation of the mouse because having multiple local populations within each critical habitat unit is the best defense against local extirpation and complete extinction. There is nothing to indicate that the situation will improve without significant conservation intervention focused on allowing the currently lacking physical features related to the wetland vegetation to regrow (either naturally or through management or protection) into suitable habitat. For example, reestablishing PCEs can likely be accomplished from mowing at different times of the year, fencing riparian areas, or changing the livestock grazing regime.

Within the 59.7 ha (147.5 ac) currently occupied by the species, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the New Mexico meadow jumping mouse. Therefore, only administrative costs are expected in approximately 1 percent of the proposed critical habitat designation. Consequently, the majority of proposed critical habitat will require additional time and resources by both the Federal action agency and the Service.

The most likely source of incremental effects of the proposed critical habitat comes from the inclusion of unoccupied areas (where the species historically occurred and are currently not known to occur). The vast majority of each of the proposed critical habitat units are considered unoccupied and currently contain small areas of suitable habitat. In the unoccupied areas, any conservation efforts or associated probable impacts would be considered incremental effects attributed to the critical habitat designation. Within the 5,832.1 ha (14,411.5 ac) of unoccupied critical habitat, incremental costs would be both administrative costs and the actual costs for implementing measures needed to avoid adverse modification in unoccupied areas. Therefore, we anticipate incremental effects with regard to ongoing and proposed Federal actions, including developing and implementing conservation measures that may differ between currently occupied and unoccupied critical habitat and habitat for the jumping mouse. Based on this rationale, we anticipate some increase in overall consultation workload and administrative efforts related to the designation of New Mexico jumping mouse critical habitat, including: (1) The potential increase in the number of consultations resulting from unoccupied areas being proposed as critical habitat; (2) initiation of consultations for ongoing projects to address adverse effects to critical habitat; and (3) possible project modification to avoid adverse modification of critical habitat in areas where significant alteration of habitat is likely or where regeneration of habitat will be precluded. Nevertheless, we expect the majority of this workload will be addressing effects to critical habitat that do not constitute adverse modification within unoccupied areas.

Critical habitat designation for the New Mexico meadow jumping mouse is unlikely to generate costs exceeding \$100 million in a single year. The total incremental section 7 costs associated with the proposed designation are estimated to be \$19,000,000 over the next 20 years, or \$1,100,000 on an annualized basis (seven percent discount rate) for both administrative and conservation effort costs.

This analysis forecasts the total number and administrative cost of future consultations likely to occur for grazing, transportation, recreation, water management, and species and habitat management undertaken by or permitted by Federal agencies within the study area. In addition, the analysis forecasts costs associated with conservation efforts that may be recommended in consultation for those activities occurring in unoccupied areas.

In occupied areas, the economic impacts of implementing the rule through section 7 of the Act will most likely be limited to additional administrative effort to consider adverse modification. This finding is based on the fact that any activities with a Federal nexus occurring within occupied habitat will be subject to section 7 consultation requirements regardless of critical habitat designation, due to the presence of the listed species; and in most cases, project modifications requested to avoid adverse modification are likely to be the same as those needed to avoid jeopardy in occupied habitat. In unoccupied areas, incremental section 7 costs will include both the administrative costs of consultation and the costs of developing and implementing conservation measures needed to avoid adverse modification of critical habitat.

Various economic benefits may result from the incremental conservation efforts identified in this analysis, including: (1) Those associated with the primary goal of species conservation (i.e., direct benefits) and (2) those additional beneficial services that derive from conservation efforts but are not the purpose of the Act (i.e., ancillary benefits). Due to existing data limitations, we are unable to assess the likely magnitude of these benefits.

As we stated earlier, we are soliciting data and comments from the public on our consideration of economic impacts, as well as all aspects of the proposed critical habitat rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Draft Environmental Assessment

The purpose of the draft environmental assessment, prepared pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), is to identify and disclose the environmental consequences resulting from the proposed action of designating critical habitat for the New Mexico meadow jumping mouse. In the draft environmental assessment, three alternatives are evaluated: Alternative A, the no action

alternative; Alternative B, the proposed rule without exclusion or exemption areas; and Alternative C, the proposed rule with exclusion or exemption areas. The no action alternative is required by NEPA for comparison to the other alternatives analyzed in the draft environmental assessment. The no action alternative is equivalent to no designation of critical habitat for the New Mexico meadow jumping mouse. Under Alternative B, critical habitat would be designated, as proposed, with no exclusions. Under Alternative C, critical habitat would be designated; however, tribal lands on Isleta Pueblo and Ohkay Owingeh would be excluded from critical habitat designation. Our preliminary determination is that designation of critical habitat for the New Mexico meadow jumping mouse will not have direct impacts on the environment. However, we will further evaluate this issue as we complete our final environmental assessment.

Required Determinations—Amended

In our June 20, 2013, proposed rule to designate critical habitat (78 FR 37328), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the probable effects on landowners and stakeholders and the resulting probable economic impacts of the designation. Following our evaluation of the probable incremental economic impacts resulting from the designation of critical habitat for the New Mexico meadow jumping mouse, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211

(Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

However, based on our evaluation of the probable incremental economic impacts of the proposed designation of critical habitat for the New Mexico meadow jumping mouse, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 12630 (Takings), and we are updating our required determinations regarding NEPA and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Following recent court decisions, the Service’s current understanding of the requirements under the RFA, as amended, is that Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out

by the Agency is not likely to adversely modify critical habitat. Under these circumstances, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Therefore, it is our position that only Federal action agencies will be directly regulated by this designation. Federal agencies are not small entities, and there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

E.O. 12630 (Takings)

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the New Mexico meadow jumping mouse in a takings implications assessment. As discussed above, the designation of

critical habitat affects only Federal actions. Although private parties that receive Federal funding or assistance or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

The economic analysis found that no significant economic impacts are likely to result from the designation of critical habitat for the New Mexico meadow jumping mouse. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the economic analysis assessment and described within this document, economic impacts to a property owner are unlikely to be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this designation of critical habitat for the New Mexico meadow jumping mouse does not pose significant takings implications for lands within or affected by the proposed designation.

National Environmental Policy Act (42 U.S.C. 4321 et. seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in conjunction with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983

(48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the New Mexico meadow jumping mouse, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation. In accordance with the Tenth Circuit, we have completed a draft environmental assessment to identify and disclose the environmental consequences resulting from the proposed designation of critical habitat. Our preliminary determination is that the designation of critical habitat for the New Mexico meadow jumping mouse would not have direct impacts on the environment. However, we will further evaluate this issue as we complete our final environmental assessment.

Government-to-Government Relationship with Tribes

We sent notification letters in November 2011 to both the Isleta Pueblo and Ohkay Owingeh describing the exclusion process under section 4(b)(2) of the Act, and we have engaged in conversations with both tribes about the proposed rule to the extent possible without disclosing predecisional information. We sent out notification letters on June 20, 2013, notifying the tribes that the proposed rule had published in the **Federal Register** to allow for the maximum time to submit comments. Following their invitation, we met with Isleta Pueblo on August 14, 2013, to discuss the proposed rule, and they provided additional information regarding their land management practices and expressed

their interest in developing an endangered species management plan. In addition to the letters sent to Ohkay Owingeh and telephone conversations, Ohkay Owingeh did not request Government-to-Government consultations or meetings. At this time, no meetings have been scheduled. In addition, we sent coordination letters to the Bureau of Indian Affairs on September 18, 2013, seeking information for our economic analysis. We will continue to communicate with all affected tribes.

Authors

The primary authors of this notice are the staff members of the New Mexico Ecological Services Field Office, Southwest Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 27, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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